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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-1373, 79-1374, 79-1375

REPUBLICAN NATIONAL COMMITTEE, *et al.*,
Appellants-Petitioners,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees-Respondents.

On Appeals from the United States District Court for the Southern District of New York and from the United States Court of Appeals for the Second Circuit and On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* COMMON CAUSE, DAVID COHEN, AND NAN WATERMAN IN SUPPORT OF APPELLEES' MOTIONS TO AFFIRM

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BRIEF OF *AMICI CURIAE* COMMON CAUSE, DAVID COHEN, AND NAN WATERMAN IN SUPPORT OF APPELLEES' MOTIONS TO AFFIRM

INTEREST OF *AMICI*

Common Cause and two of its officers, David Cohen and Nan Waterman, submit this Brief *amicus curiae* with

the consent of the parties.[1] Common Cause is a nonprofit membership corporation. It has participated actively in legislative consideration of federal election campaign reforms and in litigation concerning them, including *Buckley* v. *Valeo*, 424 U.S. 1 (1976). *Amici* participated in this case in the courts below.

QUESTION PRESENTED

The following question was certified to the court of appeals pursuant to 2 U.S.C. § 437h:

> "Does 2 U.S.C. § 441a(b)(1)(B) violate the rights of one or more of the plaintiffs under the First, Fifth, or Ninth Amendment to the Constitution—
>
> (a) by preventing a major party presidential candidate who accepts public financing for his general election campaign from making campaign expenditures in excess of the limits set forth therein;
>
> (b) by preventing a major party presidential candidate who accepts public financing for his general election campaign from accepting, and preventing other persons from giving, campaign contributions (including expenditures coordinated with the candidate's campaign) to that campaign;
>
> (c) by discriminating invidiously against major party presidential candidates who are challenging incumbents;
>
> (d) by being overbroad?"

Appendix to Jurisdictional Statement in No. 79-1373 ("App.") 66a.

The three-judge district court considered whether Chapter 95 of Subtitle H of the Internal Revenue Code

[1] We have lodged with the Clerk of the Court letters of consent from all parties.

("Subtitle H"), 26 U.S.C. §§ 9001-13, violated the Constitution for these reasons. Both courts answered the question in the negative and dismissed the case. In these circumstances, the question presented here is:

> Whether the courts below correctly found that the system of public financing of presidential general election campaigns established by the Federal Election Campaign Act and Subtitle H does not violate appellants' First, Fifth, or Ninth Amendment rights.

STATEMENT OF THE CASE

Subtitle H provides for public financing of presidential general election campaigns as an optional alternative to private fundraising. Each major party presidential nominee may at his option receive an amount that began in 1974 as $20 million and is adjusted annually for changes in the Consumer Price Index.[2] That amount will be approximately $29 million in 1980. Under Subtitle H and the Federal Election Campaign Act ("FECA"),[3] a candidate who elects public financing may not incur campaign expenses above the amount he is entitled to receive from the public fund or accept contributions to defray his expenses (except to the extent that the public fund is insufficient to provide the amount to which he is entitled).[4] A candidate who rejects public funding may raise as much as he can and spend all he can raise from private sources.[5]

[2] 26 U.S.C. § 9004; *see* 2 U.S.C. § 441a(b)(1)(B), (c). Minor party candidates can receive lesser amounts. 26 U.S.C. § 9004(a).

[3] 2 U.S.C. §§ 431, *et seq.*, as amended by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980).

[4] 2 U.S.C. § 441a(b); 26 U.S.C. § 9003(b).

[5] *See* Joint Findings of Fact ("Joint Findings") at 7, App. 10a.

Appellants do not challenge the constitutionality of public financing itself; they challenge only the expenditure and contribution limits that go with it. They seek "the right to solicit, receive and spend both public and private campaign funds, without any limitations, even though the alternative of public financing made available by Congress to candidates was clearly 'intended as a *substitute* for private contributions.'" [6]

After development of an extensive factual record, a single-judge court and a three-judge district court convened pursuant to 26 U.S.C. § 9011(b) entered detailed Joint Findings of Fact. The single-judge court then certified a constitutional question to the court of appeals sitting *en banc* pursuant to 2 U.S.C. § 437h. The three-judge court and the *en banc* court of appeals both unanimously rejected appellants' claims and dismissed the case.[7]

ARGUMENT

Appellants ask this Court to review on an expedited basis a statutory scheme that the Court has already once upheld, *Buckley* v. *Valeo*, 424 U.S. 1, 90-104 (1976), and to rewrite the statute to permit major party presidential candidates to use public funds as a supplement to, rather than a substitute for, private fundraising. The courts below unanimously rejected appellants' claims as contrary to the evidence, to logic, and to decisions of this Court. This Court need not give plenary—let alone emergency—consideration to claims that appellants spent more than a year developing, but in which eleven federal

[6] Opinion of the Three-Judge Court ("Opinion") at 4-5, App. 49a, *quoting Buckley*, 424 U.S. at 99 (emphasis added by the three-judge court).

[7] The Second Circuit's *en banc* memorandum dismissed the case "substantially for the reasons set forth in the opinion of the three-judge court . . . ." App. 69a. The single-judge court also entered an order dismissing the case.

judges found not a whisper of merit.[8] *Amici* therefore support appellees' motions for summary affirmance.[9]

I. THE COURTS BELOW CORRECTLY CONCLUDED THAT THE CHALLENGED PROVISIONS DO NOT ABRIDGE FIRST AMENDMENT RIGHTS.

A. The Challenged Provisions Do Not Violate the First Amendment Rights of Presidential Candidates.

Appellants claim that the challenged provisions violate the First Amendment because (a) the Republican candidate is allegedly compelled to accept public financing and (b) eligibility for public financing is conditioned on compliance with expenditure and contribution limits. Without dissent, the lower courts rejected that claim. Their decisions rest on several independent bases.

First, the courts found that appellants had "failed to show that presidential candidates are compelled, as a practical matter, to accept public funding." [10] In *Buckley*,

[8] The court of appeals that unanimously upheld the public financing system in this case cannot be accused of insensitivity to First Amendment values. On the day before it adopted the three-judge court opinion, the *en banc* Second Circuit dismissed a Federal Election Commission complaint, ruling unanimously that, in light of First Amendment concerns, 2 U.S.C. §§ 434(e) and 441d should be given a much narrower reading than that advocated by the Commission. *Federal Election Commission* v. *Central Long Island Tax Reform Immediately Committee*, No. 79-3014 (2d Cir. Feb. 5, 1980). In a concurring opinion in that case, Chief Judge Kaufman, joined by Judge Oakes, expressed his view that election laws generally pose a danger of interference with free expression. Yet even they found not the slightest constitutional problem in the provisions challenged in this case.

[9] Since this Court clearly has jurisdiction of this case under 26 U.S.C. § 9011(b) or 2 U.S.C. § 437h, or both, it need not unravel here the jurisdictional tangles presented by those statutes. *Buckley*, 424 U.S. at 9 n.6.

[10] Joint Findings at 26, App. 28a-29a.

this Court three times referred to public financing as "voluntary." [11] The courts below, finding the evidence consistent with that characterization, concluded that "neither the statutes under attack nor the evidence adduced by [appellants] supports [their] contention." [12] The courts below found on the present record, as this Court ruled in 1976:

> "Plainly, campaigns can be successfully carried out by means other than public financing; they have been up to this date, *and this avenue is still open to all candidates.*" Opinion at 5, App. 50a, *quoting Buckley*, 424 U.S. at 101 (emphasis added by three-judge court).

Appellants' case here rests on an attempt to reargue factual allegations unanimously rejected below.[13]

Second, the courts below properly found meritless appellants' claim that the challenged provisions unconstitutionally condition receipt of public funds on the sacrifice of a constitutional right. The "unconstitutional condition" doctrine has no applicability to this case, because the challenged provisions do not require a candidate to sacrifice any right. Subtitle H merely offers the candidate an optional alternative source of funds. It can only increase his speaking power or leave it unchanged. It cannot re-

[11] 424 U.S. at 57 n.65, 95, 99.

[12] Opinion at 5, App. 50a.

[13] Appellants could prevail in this Court only if the findings below were clearly erroneous. Rule 52(a), F.R.Civ.P. But the courts below rejected appellants' principal evidence on this point as resting on "several doubtful assumptions." Joint Findings at 23-25, App. 26a-28a. Appellants stress the courts' finding that "the risk of taking private funding only to discover that an amount exceeding the public grant cannot be raised is a great one . . . ." Jurisdictional Statement in No. 79-1373 ("Jurisdictional Statement") at 15. But appellants can find solace in that statement only by ignoring the end of it, which they omit to quote. The sentence ends: "but it is a risk that can be measured on the basis of the candidate's fundraising experience during the primaries." Joint Findings at 24, App. 27a.

duce his speaking power, for in that case he would simply decline the public fund. As the three-judge court said,

> "The Fund Act merely provides a presidential candidate with an *additional* funding alternative which he or she would not otherwise have and does not deprive the candidates of other methods of funding which may be thought to provide greater or more effective exercise of rights of communication or association than would public funding. Since the candidate remains free to choose between funding alternatives, he or she will opt for public funding only if, in the candidate's view, it will *enhance* the candidate's powers of communication and association." Opinion at 8, App. 53a (emphasis in original).

That conclusion is of course entirely consistent with this Court's statement in *Buckley* that "Subtitle H furthers, not abridges, pertinent First Amendment values." 424 U.S. at 93.

Third, the courts below also found that compelling federal interests amply justify the restrictions that accompany acceptance of public financing. As this Court recognized in *Buckley*, Congress provided for optional public financing of presidential general elections to serve at least three important and valid purposes—"to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." 424 U.S. at 91.[14] The conditions Congress imposed on acceptance of public financing are "necessary to the effectiveness of [the] program," for "[i]f a candidate were permitted, in addition to receipt of public funds, to raise and expend unlimited private funds, the purpose of public financing would be defeated." [15]

[14] *See* Opinion at 9, App. 54a.

[15] *Id.* at 9-10, App. 54a.

Finally, appellants' claim is squarely foreclosed by *Buckley*, where this Court said with respect to the precise claim appellants now raise:

> "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." 424 U.S. at 57 n.65.

Appellants acknowledged below that this statement is squarely contrary to their claim.[16] Their assertion that this passage was "dictum" [17] is incorrect. It was because of the expenditure limitations that this Court upheld the presidential campaign fund against the discrimination claims made in *Buckley* by minor parties.[18]

B. The Public Financing Provisions Do Not Abridge the First Amendment Rights of Would-Be Contributors.

Appellants claim that the contribution restrictions that result from a presidential candidate's decision to accept public funding abridge the freedom of speech of would-be contributors. The courts below unanimously rejected that contention, again on multiple grounds.

First, the courts below concluded that since the decision to reject private contributions is made by the candidate, would-be contributors' complaints are appropriately directed to the candidate, not the courts. *Marchioro* v. *Chaney*, 442 U.S. 191, 199 (1979); *Rowan* v. *Post Office*

[16] Transcript of Hearing on May 8, 1979, at 45; Brief for Plaintiffs in courts below at 21.

[17] Jurisdictional Statement at 13-14 n.8.

[18] 424 U.S. at 97; *see* Opinion at 6 & n.6, App. 51a & n.6.

Department, 397 U.S. 728, 738 (1970) ("no one has a right to press even 'good' ideas on an unwilling recipient").[19] As the three-judge court explained:

> "There is nothing improper or unusual in recognizing that a candidate rather than his or her supporters should control the method of financing the campaign. . . . [I]t would be unreasonable to preclude a candidate who prefers public financing from using it instead of private financing merely because some supporters believe that the decision deprives them of the ability to contribute to the candidate's election in the precise way they would if the campaign were privately financed." Opinion at 10-11, App. 55a-56a.

Again, this Court had reached the same conclusion in *Buckley*:

> "Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising . . . ." 424 U.S. at 57 n.65.

A candidate's decision to "forgo private fundraising" necessarily precludes supporters from making contributions to his campaign. To suggest, as appellants do,[20] that the quoted statement has no relevance because this Court was not thinking of the rights of the contributor but only of the rights of the recipient is to accuse this Court of remarkable mental gymnastics.

Second, the courts below found that would-be contributors have "a wide range of ways to express their support." [21] Appellants' contention that the public financing provisions prevent participation "unless someone else both agrees to the activity and funds it" [22] is simply

[19] Opinion at 10-11, App. 55a.

[20] Jurisdictional Statement at 23-24 & n.14.

[21] Opinion at 10, App. 55a. *See Buckley*, 424 U.S. at 20-22.

[22] Jurisdictional Statement at 23.

contrary to that finding. Individuals may spend without limit to support their chosen candidate in ways that are not coordinated with the candidate's campaign.[23] They may volunteer their services without limit and engage in a significant range of other activities in coordination with a campaign.[24] The challenged provisions restrict only the making of direct or indirect monetary contributions to a presidential candidate who does not want to receive them.[25]

Third, appellants contended that there was inadequate support from the campaigns for "grass roots" activities during the 1976 election. But the courts found that appellants had failed to establish a causal connection between public financing and the level of "top-down" support for grass roots activities in the campaigns. The courts said:

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[23] *See* 2 U.S.C. § 431(17). *Buckley* recognized that the limitation on "coordinated" expenditures is necessary to avoid evasion of direct contribution limitations. 424 U.S. at 46-47 n.53.

[24] The FECA expressly provides that individuals may contribute uncompensated personal services, fully coordinating their actions with the campaign, without limitation. 2 U.S.C. § 431(8)(B)(i). Moreover, the FECA expressly permits individual supporters to incur certain expenses traditionally associated with grass roots activities, in full coordination with a candidate's campaign. Under the Act, as recently amended by Pub. L. No. 96-187, 93 Stat. 1339 (1980), supporters may incur coordinated expenses to entertain in, or make telephone calls or send letters from, their own home, up to a limit of $1,000. 2 U.S.C. § 431(8)(B)(ii). And they may incur travel expenses in working for the campaign, up to a separate $1,000 limit. 2 U.S.C. § 431(8)(B)(iv).

[25] A statute that restricts a particular activity, for good and substantial reasons, does not violate the First Amendment merely because some individuals, who have any number of ways of expressing their opinions, say they would prefer to do so by engaging in the restricted activity. *See Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Cameron* v. *Johnson*, 390 U.S. 611 (1968); *Adderley* v. *Florida*, 385 U.S. 39 (1966); *Cox* v. *Louisiana*, 379 U.S. 559 (1965) (regulation of time, place, and manner of speech).

> "It is, however, somewhat uncertain whether increasing the amounts of funds to be spent by the candidates' national committees would have resulted in the allocation of additional funds to local activities or the allocation of even greater amounts to mass media at the expense of local activities." Joint Findings at 19-20, App. 23a.

The trend toward reliance on mass media began long before public financing was enacted and was not caused by the challenged statutes.[26] And reports of the 1980 primary campaign indicate an apparent resurgence of grass roots participation.

Moreover, Congress recently amended the FECA to stimulate grass roots activities.[27] The new law expressly exempts from the definitions of "contribution" and "expenditure" a number of expenditures related to grass roots activity and raises the dollar limits applicable to other exemptions.[28] The new legislation renders appel-

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[26] The courts below quoted and relied on an admission to that effect by appellant Republican National Committee's Chairman Brock:

> "Certainly the methodology of politics has changed enormously since the advent of mass communications, mass media and primarily television. But the change has been because the people took an easy route and became dependent upon television and both parties allowed their root structure to begin to dry up because *even without the law* that does exist to presidential campaigns, as it does now, there is a finite limit to what a candidate can raise in almost any campaign." *Quoted in* Joint Findings at 18, App. 21a-22a (emphasis added).

[27] Pub. L. No. 96-187, 93 Stat. 1339 (1980).

[28] The new legislation generally exempts "the payment by a State or local committee of a political party of the cost of campaign material (such as pins, bumper stickers, handbills, brochures, posters, party tabloids and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party." *Id.*, 2 U.S.C. § 431(8)(B)(x), (9)(B)(viii) (1980). It also exempts state and local party funding of voter registration and get-out-the-vote efforts. 2 U.S.C. § 431(8)(B)(xi), (9)(B)(ix). Finally, it

lants' "grass roots" claims all but moot, while demonstrating that the fine-tuning of these statutes is the function not of the courts but of Congress.

II. THE COURTS BELOW CORRECTLY CONCLUDED THAT THE CHALLENGED STATUTES DO NOT VIOLATE THE PLAINTIFFS' FIFTH AMENDMENT RIGHTS.

Appellants have all but abandoned in this Court their claims that the challenged statutes violate the Fifth Amendment by discriminating against major party candidates (a) who challenge incumbents or (b) who lack substantial support from labor organizations. The courts below had no trouble dismissing those claims on factual and legal grounds.

The courts below properly found that the appellants had failed either to prove that incumbents have substantial net advantages or to "demonstrate that the challenged provisions will inevitably disadvantage *all* challengers." [29] (Appellants' claim stumbled mightily, of course, on the fact that the incumbent President lost the only election conducted with public financing.) Moreover, the courts concluded that even if such advantages had been proved, "a public funding law should not be required to remedy pre-existing inequities between candidates." [30] As this Court concluded in rejecting similar allegations in *Buckley*:

> "Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on

raises from $500 to $1,000 the exemptions for residential entertainment expenses, sales of food and beverages by vendors, and travel expenses. 2 U.S.C. § 431(8)(B)(ii), (iii), (iv). *See* note 24 *supra*.

[29] Joint Findings at 32, App. 35a (emphasis in original).

[30] Opinion at 14, App. 58a.

> its face imposes evenhanded restrictions." 424 U.S. at 31.

Appellants utterly failed to prove their labor claim, and the courts below accordingly concluded that:

> "the evidence adduced by plaintiffs fails to show that presidential candidates supported by labor organizations have enjoyed any substantial advantage over opponents; that labor unions would necessarily support the Democratic presidential candidate or that, if they did so, any advantage would not be offset by corporate support for the Republican candidate. In short, the statutory provisions are neutral on their face and the claim of discrimination in favor of candidates having labor union support, being based on speculation rather than facts, must be dismissed for failure to demonstrate any denial of free speech or equal protection to presidential candidates and their supporters." Opinion at 17, App. 62a.[31]

Finally, both Fifth Amendment claims should be rejected for a reason the courts below did not need to reach. Even if these facially neutral statutes did have a different impact on different candidates, they would not be unconstitutional for that reason alone, absent evidence (of which there is none whatever) that they were enacted with a purpose to discriminate. *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979); *Washington* v. *Davis*, 426 U.S. 229 (1976).

[31] Appellants attempt to switch gears in this Court and complain about alleged discrimination against ordinary citizens in favor of labor unions and corporations. Jurisdictional Statement at 29-31. That effort is misdirected. Any such discrimination (and none has been proved) would not result from operation of the challenged statutes, but from 2 U.S.C. § 441b, which governs corporate and union activity. But appellants have explicitly stated that they are not challenging section 441b. Memorandum of Law of Plaintiffs in Opposition to the Motion to the Single District Judge to Certify Jurisdictional Questions at 3 (Mar. 23, 1979).

CONCLUSION

For the reasons stated above, the motions to affirm should be granted.

Respectfully submitted,

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